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Supreme Court, U.S.
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No. 96-1069

Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW,

Petitioner,

v.

ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA, P.C. and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. When a hospital excludes an anesthesiologist from practicing within the hospital, and the remaining anesthesiologists later raise their prices, does the subsequent price increase by his rivals preclude the excluded anesthesiologist from claiming compensable antitrust injury as required by the Clayton Act, § 4(a)?

2. Does an excluded anesthesiologist have antitrust standing under the Clayton Act, § 4(a) to challenge a purported agreement by his competitors to raise prices when his competitors allegedly excluded him for refusing to join their price-fixing conspiracy?

3. Was an anesthesiologist's *per se* "tying" claim under the Sherman Act, § 1—by which he alleged that the seller of hospital services (the "tying" service) used its purported market power to coerce its customers to buy anesthesia service (the "tied" service)—deficient as a matter of law because the seller of the "tying" service has no economic interest in the allegedly "tied" service?

4. Does the possibility of a trial in state court of a factually similar claim by a different anesthesiologist preclude summary judgment in federal court in this case?

RULE 29.6 LISTING

Respondent Saint Vincent Hospital and Health Center, Inc. ("Saint Vincent") is a Montana not-for-profit membership corporation. Saint Vincent's sole member is Sisters of Charity of Leavenworth Health Services Corporation, a Kansas not-for-profit membership corporation that has no corporate parent. Saint Vincent has no nonwholly owned subsidiaries.

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No. 96-1069

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

This case involves the requirement of antitrust injury in a private civil antitrust case arising under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (1994), which allows successful antitrust plaintiffs to recover treble damages for Sherman Act violations. The merits of the case involve Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1994).

STATEMENT OF THE CASE

The Petition's statement of the questions presented for review ignores the principal holding of the court below on the dispositive issue of antitrust injury. The court of appeals unanimously concluded—applying settled antitrust doctrine

to the summary judgment record—that lack of any harm to competition dooms these claims of antitrust injury as a matter of law. The court of appeals did not publish its memorandum affirmance. (Slip. op. at 1 n.*, App. to Pet. at A-3 n.*).

The plaintiff in this case, Petitioner David G. Healow, M.D., joins the large number of doctors who have invoked the antitrust laws in attempts to stop or undo hospital staffing decisions. Dr. Healow claims that Respondents Saint Vincent Hospital and Health Center, Inc. ("Saint Vincent") and Anesthesia Partners of Montana, P.C. ("Partners P.C.") violated the Sherman Act when Saint Vincent entered into an exclusive contract with Partners P.C.[1] Under the contract, only Partners P.C. may provide surgical anesthesia services at Saint Vincent's hospital in Billings, Montana. Such contracts routinely withstand antitrust scrutiny. *E.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 29-31 (1984).[2] Because Dr. Healow refused an offer to join Partners P.C., he cannot practice his specialty at Saint Vincent's hospital during the term of the contract.

The district court (App. to Pet. at A-29) and the court of appeals concluded that, as a matter of law, the defendants did not cause Dr. Healow to suffer "antitrust injury." As the court of appeals explained, Dr. Healow cannot show that excluding him from Saint Vincent's hospital harms competition in any relevant market for anesthesia. Thus, Dr. Healow

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[1] Respondent Anesthesia Partners, Inc. ("Partners Inc.") loaned money to start Partners P.C. and provided management services to Partners P.C. for a fee. However, Partners Inc. did not own any interest in Partners P.C.

[2] *See also, e.g., BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n,* 36 F.3d 664, 667-68 (7th Cir. 1994) (citing cases—contained in "[h]undreds, perhaps thousands of pages in West publications"—rejecting antitrust claims that challenged a single hospital's staffing decisions); *Leak v. Grant Med. Ctr.,* 893 F. Supp. 757, 760-61, 763-64 (S.D. Ohio 1995), *aff'd,* No. 95-4206, 1996 U.S. App. LEXIS 33,237 (6th Cir. Dec. 13, 1996) (unpublished); *Leyba v. Renger,* 874 F. Supp. 1229, 1232-41 (D.N.M. 1994).

cannot recover damages under the Clayton Act, § 4(a). (Slip. op. at 9-10, App. to Pet. at A-13 to A-14).

The court of appeals also agreed with the district court's holding (App. to Pet. at A-29) that Dr. Healow's price-fixing claims "make little sense on the merits" because "Healow has not shown any economic motivation for St. Vincent to conspire with Partners P.C. to fix prices in anesthesia." (Slip. op. at 11, App. to Pet. at A-15). The court of appeals explained:

> Because St. Vincent does not own Partners P.C., and receives no compensation for the delivery of anesthesia services by Partners P.C. at St. Vincent, any price increase by Partners P.C. would harm St. Vincent because it would raise the total cost of surgery at the hospital. A price increase would in turn decrease demand for surgery at St. Vincent without St. Vincent sharing in the profits gained from the increased price of anesthesia. *Cf.* Phillip Areeda, IX Antitrust Law § 1762d, at 337 (1991).

Id.

The court of appeals also held that Saint Vincent did not violate the Sherman Act, § 1 by contracting with its surgery patients and their surgeons to sell hospital services only on the condition that the patients and surgeons purchase any anesthesia services from Partners P.C. The court reasoned that Saint Vincent—the seller of the "tying" hospital services—has no economic interest in the sale of anesthesia services by Partners P.C.—the allegedly "tied" services. (Slip op. at 12-13, App. to Pet. at A-15 to A-17). Because Saint Vincent has no interest in the "tied" anesthesia services, Dr. Healow cannot show that the purported tying agreement threatens to allow Saint Vincent to acquire market power in selling anesthesia services.

Prior to oral argument, Dr. Healow asked the court of appeals to stay his appeal pending resolution of factually

similar claims by another doctor—Robert Hylton, M.D.—arising under state law in Montana court. Dr. Healow argued that deferring judgment in federal court until after resolution of Dr. Hylton's case would ensure that Montana law was applied uniformly to both plaintiffs. The court of appeals denied Dr. Healow's motion to stay. (*See infra,* A-1).[3]

ARGUMENT

The disposition of Dr. Healow's claims on antitrust injury grounds is neither novel nor controversial under the settled precedents of this Court requiring plaintiffs to prove harm to competition before they may recover treble antitrust damages. Thus it is not surprising that the issue of competitive harm is not fairly included within the questions that Dr. Healow has presented here. Yet the questions he does present in the Petition would only be relevant if this Court first reviewed and set aside the court of appeals holding on this dispositive issue. Even if competitive harm were fairly presented, this Court should not grant certiorari for the purpose of conducting such a case-specific inquiry.

Moreover, the court of appeals did not split from any other circuit when it rejected Dr. Healow's tying claim on the alternative ground that the hospital has no economic interest in the sale of anesthesia service by Partners P.C. The Second Circuit decision upon which Dr. Healow relies to show the existence of an inter-circuit conflict actually declined to address the economic interest requirement that other circuits unanimously have embraced.

Finally, there is no merit in the Petition's argument that the court of appeals should have reversed the grant of summary judgment because a state court judge had not granted summary judgment in a factually similar case.

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[3] Dr. Healow also asked the court of appeals to certify his various state law claims to the Montana Supreme Court. The court of appeals denied that request. (*See infra,* A-1).

I. The Petition Does Not Challenge the Settled—And Dispositive—Antitrust Injury Doctrine Applied by the Court of Appeals

Dr. Healow's Petition to this Court does not challenge the settled principles of antitrust injury upon which the court of appeals and the district court relied. Rather, he claims that the court below applied the antitrust injury doctrine incorrectly to the facts of his case in holding that he failed to prove any harm to competition in the relevant market. Dr. Healow's statement of the questions presented assumes that the Court will agree with his contention that the court of appeals erred in this dispositive ruling. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Because the Court need not even reach the merits of Dr. Healow's questions presented without first reviewing the dispositive antitrust injury ruling, the Petition should be denied.

A. The Petition Does Not Dispute that the Court of Appeals Correctly Stated the Controlling Principles of Antitrust Injury—That Plaintiffs Must Prove Harm to Competition

Dr. Healow's Petition does not dispute that the court of appeals correctly stated the controlling principles of antitrust injury. Section 4(a) of the Clayton Act allows a private plaintiff to recover treble damages if he is "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (1994). This Court has construed the statutory phrase "by reason of anything forbidden in the antitrust laws" as requiring proof of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977)

(emphasis in original).[4] "The injury should reflect the *anticompetitive effect* either of the violation or of anticompetitive acts made possible by the violation." *Id.* (emphasis added).

The court of appeals acknowledged the antitrust injury requirement of *Brunswick* (*see* slip op. at 9, App. to Pet. at A-13), and held that Dr. Healow failed to satisfy the requirement because he could not show "injury to competition." (Slip op. at 10, App. to Pet. at A-13). The court explained further:

> That one anesthesiologist is prevented from practicing anesthesia is not an injury to competition unless Healow can show that it has had an anticompetitive effect. *See Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (antitrust plaintiffs "must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

(*Id.*, App. to Pet. at A-14). This holding disposed of the federal antitrust claims, and with them the parallel Montana unfair competition claims.[5]

The Petition properly does not quarrel with the Ninth Circuit's statement that "antitrust plaintiffs 'must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors.'" Rather, Dr. Healow argues that the court of appeals erred in applying this law to the facts: "The Circuit Court

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[4] A plaintiff seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (Supp. I 1995), must also show "threatened" injury of the same "type." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting Clayton Act, § 16 and *Brunswick*, 429 U.S. at 489). Dr. Healow's Amended Complaint sought an injunction without expressly invoking Section 16.

[5] *See Smith v. Video Lottery Consultants, Inc.*, 858 P.2d 11, 13 (Mont. 1993) (holding that similarity between Montana statute and Sherman Act requires giving "due weight" to federal antitrust precedent).

[sic] . . . overlooked that the defendants have foreclosed competition in a market which previously was competitive. . . . " (Pet. at 15).[6] His statement of the questions presented assumes that the Court will agree with this contention, and he seeks to challenge perceived errors that would only become relevant to the outcome of the case if he could first show some harm to competition.

B. The Lack of Harm to Competition Is Not Fairly Included within the Questions Presented

Under Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Perhaps recognizing that harm to competition is a settled requirement of causal antitrust injury, the Petition's statement of the questions presented does not ask this Court to review the dispositive holding that Dr. Healow failed to satisfy that requirement. Thus, as in another antitrust case,

> [i]n order to reach the merits of this case, [the Court] would have to address a question that was neither presented in the petition for certiorari nor fairly included in the . . . question[s] that [were] presented.

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 28 (1993) (per curiam). Rather than entertaining such a question, this Court should deny the writ.

Nothing in the Petition's statement of the questions presented suffices to bring the issue of harm to competition

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[6] In his belated Supplement to Petition for Writ of Certiorari, Healow appears to contend that proof of damages to a *competitor* is sufficient to show antitrust injury, even without harm to *competition*. (Supp. to Pet. at 1-2 (citing *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1335 (10th Cir. 1996)). Healow's contention is squarely foreclosed by this Court's decisions in *Brunswick* and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334-37 (1990). Nothing in *Brown* suggests otherwise.

before the Court. "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.' " *Izumi*, 510 U.S. at 31-32 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)). Merely arguing that issue in the text of the Petition (Pet. at 15; *see also* Supp. to Pet. at 1) does not suffice either. *Izumi*, 510 U.S. at 32 n.5.

C. The Petition's Questions Presented Are Irrelevant Unless this Court Finds an Error in Applying The Competitive Injury Requirement to the Facts

Unless the Court reverses the inherently fact-bound—and dispositive—holding regarding harm to competition, no review of the issues raised in the Petition's statement of questions presented would affect the parties in any concrete way. A litigant's desire for such an inquiry in a particular case does not warrant certiorari. Here, the Court must find that the court of appeals erred in applying the competitive injury requirement to the facts before any ruling on the other purported errors could change the result.[7]

For example, the Petition's second question presented asks the Court to decide whether the alleged rise in anesthesia prices at Saint Vincent's hospital following Dr. Healow's departure "translate[s] into a lack of anti-trust injury" under the Sherman Act, § 2 and Montana law. (Pet. at i). The Petition argues—without suggesting any split of opinion between circuits or any direct ruling by this Court—that a plaintiff is not *precluded* from showing antitrust injury when his rivals foreclose him from a market and then raise their prices. Yet even if the court of appeals erred in failing to acknowledge this purported legal principle in its unpublished memorandum, correcting such an error would not change the result because—as the court of appeals held—Dr.

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[7] Similarly, the Court cannot change the judgment on the price-fixing claims unless it decides to reverse the holding that Dr. Healow failed to show any agreement by Saint Vincent to fix the price charged for anesthesia services. (Slip op. at 11, App. to Pet. at A-15).

Healow cannot show that excluding him from Saint Vincent's hospital caused any harm to competition *in the first instance.* Thus, certiorari is not warranted. *See The SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari to review question that would not affect the result).

For the same reason, the Petition's third question presented is also irrelevant to the outcome of the case. The Petition asserts that "[t]here appears to be a conflict among the Circuits" regarding whether a plaintiff possesses "standing" to challenge an alleged agreement among his rivals to raise their prices when—as in this case—the plaintiff claims that his unwillingness to engage in purported price-fixing caused him to be foreclosed from participating in the market. (Pet. at i). Dr. Healow argues that a plaintiff has standing in such a case. Yet even if the court of appeals erred in failing to acknowledge this purported principle of antitrust standing, correcting such an error would not change the result because Dr. Healow cannot show that excluding him from Saint Vincent's hospital caused any harm to competition—an undisputed prerequisite of antitrust injury. As this Court explained in *Cargill*, "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4. . . . " 479 U.S. at 110 n.5. Dr. Healow's failure to make the "necessary" showing of antitrust injury renders any further analysis of standing irrelevant.

Thus, review by this Court of the Petition's questions presented would serve no purpose beyond correcting purported errors that do not affect the outcome of the case at bar. Merely correcting such errors—especially errors in an unpublished memorandum decision—is not a "compelling reason[ ]" for exercising the Court's discretion to grant certiorari. S. Ct. R. 10. Assuming that the Court decides not to

review the factual record for evidence of harm to competition, resolution of the purported legal errors regarding antitrust injury and standing "can await a day when the issue is posed less abstractly." *The SS Monrosa,* 359 U.S. at 184.

II. There Is No Conflict Between Circuits Concerning the Economic Interest Requirement in Tying Cases

Dr. Healow contends that there is conflict between the circuits concerning the requirement of proving that the seller of the "tying" service has an economic interest in the "tied" service in a Sherman Act § 1 case. There is no such conflict. Moreover, the dispositive ruling by the court of appeals on the issue of antitrust injury makes any review of the economic interest requirement an abstract exercise that would not affect the parties. Finally, this Court need not and should not address Dr. Healow's factual contentions regarding his effort to satisfy the economic interest requirement.

There is no conflict between the circuits. In addition to the Ninth Circuit, the Third, Fifth, Sixth, Seventh and Eleventh Circuits have all acknowledged that the seller of the tying product must have an economic interest in the tied product in a *per se* tying case.[8]

Contrary to Dr. Healow's contention, the Second Circuit did not "reject[ ] the economic interest element in *Gonzalez v. St. Margaret's [House] Housing Dev. Fund [Corp.],* 880 F.2d 1514 (2nd Cir. 1989)." (Pet. at 12). Rather, the court of appeals in *Gonzalez* declined to address the question, instead remanding

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[8] *See Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.,* 732 F.2d 1403, 1407 (9th Cir. 1984); *Venzie Corp. v. United States Mineral Prods. Co.,* 521 F.2d 1309, 1317-18 (3d Cir. 1975); *Keener v. Sizzler Family Steak Houses,* 597 F.2d 453, 456 (5th Cir. 1979); *Beard v. Parkview Hosp.,* 912 F.2d 138, 142 (6th Cir. 1990); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.,* 758 F.2d 203, 207-08 (7th Cir. 1985); *Thompson v. Metropolitan Multi-List, Inc.,* 934 F.2d 1566, 1579 (11th Cir. 1991).

> for a very limited inquiry to determine whether the impact of the alleged tying arrangement [upon sales of the tied product] is substantial enough to warrant the protection of the antitrust laws.

880 F.2d at 1519. The case involved a non-profit housing facility that required its tenants to purchase a daily meal from the facility's outside food contractor. Recognizing that many other courts had embraced the requirement of showing an economic interest in the tied product, the Second Circuit said,

> it seems ill-advised for us to adopt such a significant change, with possibly far-reaching ramifications, in our tie-in doctrine in a case as devoid of ordinary antitrust considerations as this one, *especially if the problem does not have to be addressed.*

Id. at 1517 (emphasis added).

Moreover, the purported conflict between the circuits does not affect the outcome of this case. Regardless of Saint Vincent's claimed economic interest in the sale of anesthesia services by Partners P.C., Dr. Healow's antitrust claims must fail because—as the court of appeals held—he cannot show any harm to competition as a result of his exclusion from the market. Thus, review by this Court of the economic interest requirement would not affect the parties in any concrete way, and the Court should therefore deny the Petition. *The SS Monrosa,* 359 U.S. at 184.

III. There Is No Substantial Question Concerning the Purported Error in Applying Federal Rule of Civil Procedure 56

Dr. Healow's final point of error challenges the propriety of dismissing his federal and state antitrust claims at the summary judgment stage when another doctor—Dr. Robert Hylton—had factually similar claims under state law awaiting a possible trial in Montana court. This contention is

meritless. Federal courts have a nearly unfailing obligation to decide cases within their jurisdiction. Especially when ruling on a federal claim—such as Dr. Healow's federal antitrust claim—a federal court does not stay its hand while awaiting the outcome of state court proceedings except in extraordinary circumstances. *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 25-26 (1983).[9]

Dr. Healow never asked the district court to abstain and he never tried to show exceptional circumstances warranting abstention. Accordingly, the court of appeals properly denied his belated request to stay appellate review pending resolution of Dr. Hylton's Montana case. (*See infra*, A-1). The Petition does not—and cannot—cite any authority to support the strained contention that the federal courts erred because

> [t]o whatever extent the Montana District Court proceeds to trial of Dr. Hylton's case . . . [t]o that same extent the [Ninth] Circuit Court [of Appeals] below will have violated its own lenient standard of review in affirming summary judgment against an identically situated plaintiff.

(Pet. at 21).

Dr. Healow's Supplement to Petition for Writ of Certiorari explains at length that Dr. Hylton later prevailed in his state law trial, and he then reached a settlement with the defendants. (Supp. to Pet. at 2-8). Dr. Healow appears to argue that the Montana judge's various rulings might have invalidated the Ninth Circuit's *prior* affirmance under the doctrine of collateral estoppel—if only the defendants had not "satisfied Dr. Hylton's demands before judgment was filed." (Supp. to Pet. at 7). But the Ninth Circuit was not

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[9] At the time of the district court's ruling in Dr. Healow's case, the defendants had not yet filed their motion for summary judgment in Dr. Hylton's state law case. The Montana judge still had not ruled on the summary judgment motion when the court of appeals in this case affirmed the disposition of Dr. Healow's federal and state claims.

bound to await the state court's action before affirming the district court judgment. *Moses H. Cone,* 460 U.S. at 23, 25-26.[10]

The question presented is meritless and does not warrant certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[10] Contrary to Dr. Healow's argument, any "policy considerations of fostering reliance on adjudication and promoting comity between State and Federal Courts" (Supp. to Pet. at 7) should have counseled the *state court* to abide the *federal courts'* prior rulings.

APPENDIX A

FILED
DEC -8 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID G. HEALOW, *Plaintiff-Appellant* vs. ANESTHESIA PARTNERS, INC., et al. *Defendants-Appellees*	No. 95-35241 DC# CV-92-187-JDS Montana ORDER

Before: SNEED and TROTT, Circuit Judges

Appellant's "Motion to Certify Legal Issues" to the Montana State Supreme Court is denied.

Appellant's motion to stay this appeal pending resolution of a related state court case is also denied.

This case is ready for calendaring.

APPENDIX B

Clayton Act, § 4(a), 15 U.S.C. § 15(a) (1994)

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

APPENDIX C

Clayton Act, § 16, 15 U.S.C. § 26 (Supp. I 1995)

Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.